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In The

Supreme Court of the United States

October Term, 1996

KENTUCKY RIGHT TO LIFE, INC., *et al.*,

Petitioners,

v.

DAVID STENGEL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Sixth Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI OF KENTUCKY RIGHT TO LIFE, INC., *et al.*

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QUESTIONS PRESENTED

1. May a State impose a limit on the amount a person may contribute in the aggregate annually to multiple political action committees, in order to prevent evasion of the limit on the amount a person may contribute to a single candidate.

2. Is it reasonable to limit aggregate contributions to multiple political action committees, and not limit aggregate contributions to multiple candidates and multiple political parties, because there are real differences in the ability of contributors to misuse those entities as a conduit for circumventing the limit on the amount a person may contribute to a single candidate?

3. Must a State offer evidence of specific legislative findings of fact, supported by empirical proof, demonstrating the compelling nature of the harm sought to be addressed and the narrow tailoring of the means chosen to address that harm, where this Court has already held the interest is compelling and has already held such means are narrowly tailored?

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STATEMENT OF THE CASE

Petitioners ("KRL") brought an action against Respondents (the "Registry") for declaratory and injunctive relief, challenging as facially unconstitutional several of Kentucky's campaign finance reform laws.[1] The United States District Court for the Western District of Kentucky entered summary judgment, upholding the constitutionality of all but one statute. App. 34.[2]

KRL appealed, and the United States Court of Appeals for the Sixth Circuit affirmed the constitutionality of the challenged statutes. *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir. 1997), App. 1.[3]

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[1] For a complete listing of the challenged statutes, see the Petition at p. 3 n. 2.

[2] The District Court invalidated an administrative fee that was imposed only upon PACs. App. 50-53. The Registry did not appeal that decision.

[3] The District Court correctly held there was not a justiciable case or controversy as to several of Petitioners' claims because the Registry did not enforce the statutes in the manner hypothesized by Petitioners. The District Court therefore held certain of "Plaintiffs' claims are moot." App. 43. While the case was being briefed in the Sixth Circuit, the Kentucky General Assembly amended various portions of the Act, eliminating the bases of Petitioners' strained interpretations. The Court of Appeals, therefore, affirmed the judgment that the claims were moot. App. 1. Because both the District Court and the Court of Appeals found that those claims presented no justiciable case or controversy, KRL would not be precluded from litigating their constitutional claims in the unlikely event the Kentucky General Assembly re-enacted one or more of the pre-existing statutes which have now been repealed. Therefore, the question whether the trial court judgment should be affirmed or vacated does not present an issue that is even sufficiently arguably certworthy to merit further discussion.

In the Petition, KRL challenges only the statute which limits the amount a person may contribute in the aggregate to permanent committees ("PACs") to $1,500 per year. Ky. Rev. Stat. § 121.150(10) (hereinafter the "Aggregate PAC Limit").[4]

The Sixth Circuit recognized that PACs may be misused as a conduit for indirect contributions to candidates designed to circumvent Kentucky's $1,000 limit on contributions to candidates.[5] The Sixth Circuit therefore held that the aggregate limitation is narrowly tailored to advance Kentucky's compelling interest in preventing both the appearance and the actuality of corruption in Kentucky elections.[6]

The Sixth Circuit also recognized that the differing structures of PACs, political parties and candidate campaign committees permits those entities to be regulated differently to protect the integrity of the electoral process. The Sixth Circuit therefore held that imposing the aggregate limitation on contributions to PACs, but not on contributions to political parties or candidate campaign committees, is not a denial of equal protection.[7]

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[4] Aggregate limits on contributions by PACs to candidates are not at issue in this Petition since Petitioners have expressly declined to include in their Petition the judgment upholding § 121A.030(4), the Kentucky statute which limits PAC contributions to slates of candidates for governor and lieutenant governor to $150,000 in the aggregate per slate per election. App. 49-50.

[5] Ky. Rev. Stat. § 121.150(6) limits individual contributions to a candidate to $1,000 per election. Ky. Rev. Stat. § 121.150(11) similarly limits individual contributions to any one political party to $1,000 per year.

[6] 108 F.3d at 649, App. 27-28.

[7] 108 F.2d at 649, App. 27-28.

SUMMARY OF ARGUMENT

The questions presented by KRL's Petition have been clearly resolved by this Court, and the Sixth Circuit's decision is not in conflict with any decision of this Court or another Court of Appeals.

There is no ambiguity in this Court's precedents regarding the States' constitutional power to limit aggregate contributions to PACs as a corollary to limiting the size of contributions to candidates. That issue was firmly resolved by this Court in *Buckley v. Valeo*,[8] and reaffirmed in *California Medical Association v. Federal Election Commission*, ("*CMA*").[9] Those precedents make clear that the prevention of both the appearance and the actuality of corruption in the electoral process is a compelling State interest.[10] Those precedents also make clear that aggregate limits on PAC contributions make it more difficult to evade limits on contributions to candidates, and therefore are a narrowly tailored means of furthering the State's compelling interest in preventing both corruption and the appearance of corruption.[11]

Because Kentucky's Aggregate PAC Limit is consistent with these precedents, the Registry need not provide detailed empirical support for Kentucky's legislative finding that combating corruption and its appearance is a compelling State interest, and that the Aggregate PAC

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[8] 424 U.S. 1, 38 (1976).

[9] 453 U.S. 182, 197-199 (1981). In *CMA*, five Justices upheld the aggregate limit on contributions to PACs, 453 U.S. at 197-99, 203; and the dissenters would have dismissed for want of jurisdiction. *Id.*, 204-209.

[10] *Buckley*, 424 U.S. at 38; *CMA*, 453 U.S. at 197-199.

[11] 424 U.S. at 38; 453 U.S. at 197-199.

Limit is narrowly tailored to further that interest.[12] Where, as here, this Court has specifically identified the interest as compelling, and has specifically approved the prophylactic measure as narrowly tailored to advance that interest, the State is not required to present evidence to the District Court of a legislative finding redundant of this Court's precedents. The cases cited by KRL are therefore completely distinguishable.[13] Furthermore, even if Kentucky were required to submit such evidence, KRL waived this issue when it advised the District Court there was "no need for any testimony or anything in the record" and that the material facts were agreed to by the parties.[14]

Nor is there a split in the Circuits on this issue. *Carver v. Nixon* was limited to a question not previously decided by this Court, and it is therefore completely distinguishable.[15]

The Sixth Circuit's opinion is also consistent with this Court's precedents permitting political action committees to be regulated differently from political parties and candidate campaign committees without contravening the

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[12] *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 2378 (1995).

[13] *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994); *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

[14] Transcript of Preliminary Injunction Hearing, Supp. App. 4. *See also* App. 54; Argument IIA, *infra*.

[15] *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), involved the question whether a $300 limit on contributions to statewide candidates is unconstitutionally low. Furthermore, the Missouri limit was adopted by referendum, not by the legislature.

Equal Protection Clause.[16] Contrary to KRL's political rhetoric, Kentucky's Aggregate PAC Limit is not part of a nationwide "witch hunt" of PACs, and the Sixth Circuit's holding is not predicated upon the conclusion that PACs are "nefarious" or inherently corrupt.[17] Relying upon the opinion of the Court in *CMA*, which was reaffirmed by a unanimous Court in *Federal Election Commission v. National Right to Work Committee*,[18] the Sixth Circuit held that aggregate contribution limits may be imposed upon PACs, without being imposed upon political parties and candidate campaign committees, because there are real differences in the ability of contributors to misuse those entities to evade the limits on contributions to candidates[19]

There is no conflict among the circuits on this issue, either. In *Vote Choice v. DiStefano*,[20] the First Circuit merely found no legitimate reason for treating PACs, political parties and candidate campaign committees differently on the facts of that case, which were clearly distinguishable from the facts of this case.[21]

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[16] *California Medical Association, supra*, 453 U.S. at 201; *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 210-211 (1982).

[17] *See* Petition at 6-9, 13 and 25.

[18] 459 U.S. at 210.

[19] 108 F.3d at 649, App. 28-29.

[20] 4 F.3d 26 (1st Cir. 1993).

[21] In *Vote Choice*, Rhode Island had required PACs to report the "first dollar" in contributions, while the reporting threshold for parties and candidates was $100. The First Circuit could discern no basis for that disparate treatment. 4 F.3d at 33-36.

ARGUMENT

I. The Sixth Circuit followed this Court's precedents when it upheld the Aggregate PAC Limit.

A. This Court has squarely upheld aggregate limits on contributions to PACs.

In *Buckley v. Valeo,* this Court expressly upheld a $25,000 aggregate annual limit on contributions by individuals to all candidates, PACs and political parties. Holding that the aggregate limit survived strict scrutiny, this Court said:

> The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity **serves to prevent evasion of the $1,000 contribution limitation** by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party. **The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.**[22]

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[22] *Buckley*, 424 U.S. at 38-39 (emphasis supplied). KRL also claims throughout its brief that the Aggregate PAC Limit is more restrictive than the aggregate contribution limitations previously upheld by this Court because Petitioner Zoeller, who has already contributed $1500 to other PACs, is effectively prevented from making *any* contributions to KRLPAC. First, the Aggregate PAC Limit only limits the amount Zoeller can

In *CMA*, a majority of the Justices applied *Buckley's* holding to uphold an aggregate annual limit on contributions to multi-candidate PACs. A plurality of the *CMA* Court held:

> We also disagree with appellants' claim that the contribution restriction challenged here does not further the governmental interest in preventing the actual or apparent corruption of the political process. **Congress enacted § 441a(a)(1)(C) in part to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*.** . . . If appellants' position – that Congress cannot prohibit individuals and unincorporated associations from making unlimited contributions to multicandidate political committees – is accepted, then . . . **these contribution limitations could be easily evaded."**[23]

While this portion of the *CMA* opinion was a plurality of four, Justice Blackmun concurred in the holding that aggregate limits on PAC contributions are constitutional. Justice Blackmun chose not to join the plurality opinion because he still disagreed with *Buckley's* "premise that the First Amendment test to be applied to contribution limitations is different from the test applicable to

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contribute in the aggregate to all PACs; the PACs to which he chooses to contribute the permissible amount *is his choice*. Second, *Buckley* upheld the aggregate contribution limit at issue there despite its express recognition that the aggregate limit posed "an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." *Buckley*, 424 U.S. at 38.

[23] *CMA*, 453 U.S. at 197-198 (plurality opinion) (emphasis supplied).

expenditure limitations."[24] However, while he had dissented in *Buckley*, Justice Blackmun was "willing to accept as binding the Court's judgment in that case that the contribution limitations challenged there were constitutional."[25] Justice Blackmun, therefore, concurred in the plurality's judgment that *Buckley* controlled the question whether aggregate limits on contributions to PACs survived constitutional scrutiny, and he voted to uphold the aggregate limit as a narrowly tailored means of preventing corruption, saying:

> I conclude that contributions to multicandidate political committees may be limited to $5,000 per year **as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in** *Buckley*. The statute challenged here is thus analogous to the $25,000 limitation on total contributions in a given year that *Buckley* held to be constitutional. . . . By definition, a multicandidate political committee . . . makes contributions to . . . candidates for federal office. Multicandidate political committees are therefore essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption.[26]

Accordingly, in *CMA*, five Justices upheld the aggregate limitation on contributions to PACs as a constitutional means of preventing evasion of limits on

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[24] *Id.* at 202 (Blackmun, J., concurring in part and concurring in the judgment).

[25] *Id.*

[26] *Id.* at 203.

contributions to candidates. Furthermore, the four dissenting Justices dissented on jurisdictional grounds without reaching the merits.[27] The Sixth Circuit's conclusion that Kentucky's Aggregate PAC Limit advances the State's compelling interest in preventing corruption and its appearance by preventing evasion of the limits on contributions to candidates is therefore consistent with this Court's precedents. KRL is simply wrong when it asserts that "the Sixth Circuit relied almost exclusively on *CMA* – particularly the plurality opinion – in fashioning its decision."[28] The Sixth Circuit relied upon the decisions in both *Buckley* and *CMA* upholding similar aggregate limitations. The Sixth Circuit held:

> the $1,500 aggregate limit furthers the Act's statutory scheme by preventing evasion of the $1,000 limit upon direct individual contributions to candidates. Absent this aggregate limit, unscrupulous individuals could pass unlimited amounts of cash to permanent committees with the understanding that those funds would be disbursed directly to specific candidates. *See Buckley*, 424 U.S. at 38 (noting possibility of evasion in upholding similar $25,000 limitation in the context of federal elections). In that sense, the limitation is integral to the effectiveness of the overall statutory scheme of combatting corruption in the political process. *See id. See also Calif. Med. Ass'n.*, 453 U.S. at 198-199.[29]

Despite the holdings in *Buckley* and *CMA*, KRL contends that a State may not limit contributions to committees, but may only limit contributions to candidates.[30] To

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[27] 453 U.S. at 204-209.

[28] Petition at 17.

[29] 108 F.3d at 649, App. 27.

[30] Petition at 9-10, 17-18.

support this proposition, KRL relies upon *Citizens Against Rent Control v. City of Berkeley*[31] and *Federal Election Commission v. National Conservative Political Action Committee*.[32] However, those decisions are completely distinguishable.

Citizens Against Rent Control involved limitations on contributions in a referendum on public issues.[33] *NCPAC* involved a limit on independent expenditures by PACs.[34] Accordingly, neither case supports KRL's contention that limitations may constitutionally be imposed only on contributions to candidates, but may not constitutionally be imposed upon contributions to committees which in turn contribute to candidates.

In sum, the Sixth Circuit's decision upholding Kentucky's Aggregate PAC Limit does not conflict with any prior decision of this Court. It is, in fact, amply supported by this Court's prior decisions.

B. The compelling state interest recognized by this Court fully supports the Sixth Circuit's finding that Kentucky's Aggregate PAC Limit is constitutional.

KRL contends that a State may not limit aggregate contributions to PACs because, they contend, this Court has only recognized a compelling interest in deterring

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[31] 454 U.S. 290 (1981).

[32] 470 U.S. 480 (1985) ("*NCPAC*").

[33] 454 U.S. at 296-299 ("Whatever may be the state interest . . . in . . . limiting contributions to . . . a candidate's committees there is no significant state or public interest in curtailing debate or discussion of a ballot measure").

[34] 470 U.S. at 495 ("Unlike *California Medical Assn.*, the present cases involve limitations on expenditures by PACs, not on the contributions they receive . . . ").

quid pro quo relationships which arise from large contributions directly to candidates.[35] This argument ignores not only the precise holdings in *Buckley* and *CMA*, but also this Court's repeated holding that the compelling interest supporting limits on contributions extends not only to preventing the actuality and appearance of quid pro quo corruption, but also to preventing erosion of the public's confidence in the integrity of the political process.

In *Buckley*, this Court agreed with the D.C. Circuit that Congress had a compelling interest not only in preventing particular contributors' undue influence over particular candidates, but also in alleviating the public's perception that elected officials were responding only to moneyed interests rather than the public interest. The *en banc* D.C. Circuit noted this interest had been recognized previously by this Court:

> The Constitution also takes account of the governmental interest in curbing the appearance of undue influence, in order to avoid the corrosion of public confidence that is indispensable to democratic survival. In *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 565, 93 S.Ct. 2880, 2890, 37 L.Ed.2d 796 (1973), Justice White articulated this: "[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."[36]

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[35] Petition at 14-17.

[36] *Buckley v. Valeo*, 519 F.2d 821, 841 (D.C. Cir. 1975) (en banc), *quoting*, *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 565 (1973).

In *Buckley*, this Court also quoted *Civil Service Commission v. Letter Carriers*, explicitly reaffirming that the compelling interest includes preserving public confidence in the integrity of the process:

> To the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . **Of almost equal concern** as the danger of actual quid pro quo arrangements **is the impact of the appearance of corruption stemming from public awareness** of the opportunities for abuse inherent in a regime of large individual financial contributions. . . . Congress could legitimately conclude that **the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."**[37]

Accordingly, the compelling interests identified by the Court in *Buckley* included the interest in avoiding the public's perception that the political **process, itself**, was corrupt because the influence wielded by the special interests overwhelms the public's interest. The Court specifically recognized that public confidence is essential to any system of representative self-government.

This threat to the political process was again recognized by this Court in *Federal Election Commission v. National Right to Work*.[38] A unanimous Court emphasized that, in Buckley: "we specifically affirmed the importance of preventing **both** the actual corruption threatened by large financial contributions and **the eroding of public**

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[37] *Buckley*, 424 U.S. at 26-27, *quoting Civil Service Commission v. Letter Carriers*, supra, 413 U.S. at 565.

[38] 459 U.S. 197 (1982).

confidence in the electoral process through the appearance of corruption. These interests directly implicate 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process.' "[39] In *Federal Election Commission v. Massachusetts Citizens For Life*, this Court similarly acknowledged "the historical role of contributions in corruption of the electoral **process**."[40]

The compelling nature of the interest in protecting the integrity of the process was also reaffirmed in *Austin v. Michigan State Chamber of Commerce*, where this Court once again looked beyond the financial quid pro quo to recognize Michigan's compelling interest in resisting "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[41]

Similarly, this Court in *Federal Election Commission v. National Conservative Political Action Committee* ("*NCPAC*") defined corruption as "a subversion of the political process [whereby] [e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."[42] Most recently, a plurality of this Court identified the compelling governmental interest as

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[39] *Id.* at 208, *quoting, United States v. Automobile Workers*, 352 U.S. 567, 570 (1957).

[40] 479 U.S. 238, 260 (1986) (emphasis supplied).

[41] 494 U.S. 652, 660 (1990).

[42] 470 U.S. 480 at 496.

"assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption."[43]

Despite the consistent holdings of this Court, KRL asserts "this Court has held that . . . the only compelling interest for restricting political spending [is] preventing the *quid pro quo* corruption that may result from large individual contributions to candidates. . . . "[44] To support this assertion, KRL truncates the Chief Justice's opinion for the Court in *NCPAC*. However, that opinion actually said:

> We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption **or the appearance of corruption** are the only legitimate and compelling government interests thus far identified for restricting campaign finances.[45]

In his opinion for a unanimous Court in *National Right to Work*, the Chief Justice similarly wrote:

> Likewise, in *Buckley v. Valeo, supra*, we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions **and the eroding of public confidence in the electoral process** through the appearance of corruption. These interests directly implicate "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process."[46]

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[43] *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S.Ct. 2309, 2313 (1996) (plurality opinion).

[44] Petition at 9.

[45] 470 U.S. at 496-97 (emphasis supplied).

[46] 459 U.S. at 208-09, quoting, *United States v. Automobile Workers*, supra, 252 U.S. at 570 (emphasis supplied).

In sum, the Sixth Circuit's decision that Kentucky's Aggregate Limit was narrowly tailored to advance Kentucky's compelling interest is completely consistent with a long line of decisions of this Court.[47]

C. The Sixth Circuit's determination that the Aggregate PAC Limit is narrowly tailored to Kentucky's compelling interests is consistent with this Court's precedents.

Consistent with this Court's precedents, the Sixth Circuit also found that Kentucky's Aggregate PAC Limit is narrowly tailored to advance Kentucky's compelling interest in preventing corruption and its appearance. KRL contends, however, that the Aggregate PAC Limit is not sufficiently narrowly tailored because "Kentucky already forbids both individuals and PACs from circumventing the contributions [sic] limits to candidates: Ky. Rev. Stat. Ann. § 121.150(8) prohibits PACs from 'earmarking' contributions to evade the $1,000 limit, and Ky. Rev. Stat. Ann. § 121.150(9) similarly prohibits individuals from evading it."[48] However, KRL did not argue this issue before either the District Court or the Sixth Circuit.[49]

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[47] Thus, KRL's quotation of this Court's decision in *NCPAC* does not, as KRL alleges, call into question the CMA rationale. *See* Petition at 15, quoting *Federal Election Commission v. National Conservative Political Action Committee, supra*, 470 U.S. at 495. Rather, that quote evidences *NCPAC*'s determination that the "speech by proxy" rationale did not apply to independent expenditures by a PAC.

[48] Petition at 21.

[49] *See* KRL's Memorandum in Support of Motion of Preliminary Injunction at 49-51 and Brief of the Appellants at 42-43, wherein KRL argues only that the statute is not narrowly tailored because the **amount** of the limit on contributions to PACs is too low.

Because KRL raises the issue for the first time in its Petition, it is not properly before this Court.

As this Court stated in *Singleton v. Wulff*:[50]

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed.1037 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute.

Furthermore, this Court rejected a similar argument in *Buckley*. In that case, it was contended that preventing *quid pro quo* arrangements was the State's only compelling interest, and that anti-bribery statutes and disclosure requirements were therefore the maximum governmental regulation constitutionally allowable.[51] This Court rejected that contention, however, and squarely held the States' compelling interests are not limited to "only the most blatant and specific attempts of those with money to influence governmental action."[52] Instead, the Court held

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[50] 428 U.S. 106, 120 (1976).

[51] *Buckley*, 424 U.S. at 27-28.

[52] *Id.* at 28.

the compelling interests include restoring "confidence in the system of representative Government."[53] The Court, therefore, held that the individual and aggregate contribution limits at issue there were sufficiently narrowly tailored to survive strict scrutiny.[54]

Indeed, in *Buckley*, this Court upheld an aggregate annual limit even broader than Kentucky's Aggregate PAC Limit. The statute upheld in *Buckley* imposed a $25,000 annual limit on individual contributions to **all** candidates, PACs and political parties, a limit more restrictive of political contributions than Kentucky's aggregate annual limit on contributions to PACs alone. This Court reasoned that "this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of **unearmarked** contributions to political committees likely to contribute to that candidate . . . "[55] Accordingly, the mere fact that Kentucky expressly prohibits "earmarking" contributions

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[53] *Id.* at 27 *quoting, Civil Service Commission v. Letter Carriers, supra,* 413 U.S. at 565. *Accord CMA,* 453 U.S. at 199 n. 20.

[54] Last term, a plurality of this Court said that where evasion of individual contribution limits was the harm sought to be prevented, a limitation on contributions to the conduit entity was an appropriately narrowly tailored response. *Colorado Republican Campaign Committee v. Federal Election Commission, supra,* 116 S.Ct. at 2316. "We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits were a serious matter, might decide to change the statute's limitations on contributions to political parties. *Cf. California Medical Assn.,* 453 U.S., at 197-199 (plurality opinion) (danger of evasion of limits on contribution to candidates justified prophylactic limitation on contributions to PAC's)."

[55] 424 U.S. at 38-39.

to PACs does not preclude the conclusion that the Aggregate PAC Limit is not overbroad, but is a narrowly tailored prophylactic remedy which deters evasion of the limitations on contributions to candidates.

II. The Registry need not offer evidence of specific legislative findings, supported by empirical proof, for the District Court to determine the Aggregate PAC Limit is narrowly tailored to advance a compelling state interest.

A. Because KRL advised the District Court that there was no need for testimony or other proof to be entered into the record, KRL cannot now argue that the Registry's failure to offer evidence of legislative findings or other proof warrants a judgment in KRL's favor.

KRL contends the Sixth Circuit decision is unsupported because the Registry failed to offer evidence that the Kentucky legislature made specific findings concerning the compelling interest being advanced and the narrow tailoring of the Aggregate PAC Limit.[56] However, KRL waived that argument when it advised the District Court that there was "no need for any testimony or anything in the record" and that the material facts were agreed to by the parties.[57] In the District Court, KRL had moved for a preliminary injunction and the Registry had moved for summary judgment. After both motions were fully briefed, the District Court heard the oral argument of counsel. At that proceeding, the District Court *sua sponte* suggested that the motion for preliminary injunction be consolidated with the hearing on the merits. The

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[56] Petition at 23-25.

[57] Transcript of Preliminary Injunction Hearing at 4, Supp. App. at 2. *See also* App. 54.

District Court, therefore, specifically asked the parties whether there was any "need for any testimony or anything in the record" and whether "the facts, although they have not been stipulated, are agreed to by everyone."[58] KRL agreed that there was no need for any evidence to be presented by either side,[59] and consented to consolidating the preliminary injunction with the hearing on the merits.[60] KRL, therefore, waived its argument that the Registry has the burden of proving legislative findings demonstrating that the Kentucky legislature specifically determined that the Aggregate PAC Limit is narrowly tailored to advance an interest that is compelling.

B. The State is not required to offer evidence of specific legislative findings of fact, supported by empirical proof, demonstrating the compelling nature of the harm sought to be addressed and the narrow tailoring of the means used to address the harm, where this Court has already held the interest is compelling and the means are narrowly tailored.

Because Kentucky's Aggregate PAC Limit is consistent with Supreme Court precedent, the Registry need not provide evidence of specific legislative findings that combating corruption and its appearance is a compelling state interest or that the statute is a narrowly tailored means of furthering that interest. As this Court recently stated in *Went For It*:

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[58] Transcript of Preliminary Injunction Hearing at 4, Supp. App. at 2.

[59] See footnote 57, supra.

[60] Transcript of Preliminary Injunction Hearing at 3, Supp. App. at 1. *See also* App. 54.

> In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."[61]

In this case, the harm predicted by the Kentucky legislature is the perception of corruption from contributions exceeding the limits enacted in Kentucky, a harm already recognized as real by this Court. Indeed, this Court's recognition of the potential for corruption of the political process inherent in campaign finance, and the acceptability of contribution limits as a means of combating that corruption, have been taken as a given in every campaign finance case decided by this Court since *Buckley*.[62] For example, in *NCPAC*, this Court recognized that

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[61] *Went For It*, 515 U.S. 618, 115 S.Ct. at 2378, quoting, *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 1857-1858, 119 L.Ed.2d 5 (1992).

[62] *See* cases cited at Argument I.B., *supra*. Moreover, the need for Kentucky's campaign finance legislation is supported by the history of corrupt politics in Kentucky. The legislative framework regulating campaign finance was enacted in the wake of an FBI sting operation in which public officials had been sentenced to prison for selling their influence for as little as $400. Miller, Kentucky Politics and Government, 197-215 (Univ. Nebraska Press 1994). As the District Court noted "No one with a working knowledge of our recent political history can doubt that some limitation on contributions will contribute directly to reducing the perception of political corruption in Kentucky. . . . Who should know better than the legislature what might wash the appearance of corruption from our politics?" App. 45.

it is "proper [to] defer[ ] to a congressional determination of the need for a prophylactic rule where the evil of political corruption ha[s] long been recognized. . . . "

Not only has the compelling interest in preventing corruption been firmly established by this Court, the use of aggregate limits on contributions to PACs to prevent evasion of limits on contributions to candidates has twice been upheld by this Court. *Buckley* clearly held that aggregate contribution limits prevent evasion of candidate contribution limits and, therefore, are narrowly tailored to further the compelling interest in preventing the actuality and appearance of corruption. *CMA* applied *Buckley* and upheld aggregate limits on contributions to PACs. Clearly, the Kentucky legislature may rely upon these holdings without the formality of legislative findings that deterring corruption is a compelling interest and that aggregate PAC limits are not overbroad. Clearly, the District Court may rely upon these holdings without requiring the Registry to offer into evidence legislative history proving the Kentucky legislature made findings of fact that the particular remedy chosen was narrowly tailored, not overbroad.

KRL relies upon *Turner Broadcasting*[63] and *National Treasury Employees Union*,[64] but those cases are inapposite. In *Turner Broadcasting* this Court was evaluating, for the first time, the Government's proffered rationale for the cablecasting "must carry" rules, to wit: that the broadcast industry is jeopardized by the growth of cable. The Court recognized that, in order to make sound predictions in this economic arena, Congress had to "amass and evaluate the vast amounts of data . . . bearing upon . . . [a]

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[63] *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994).

[64] *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

complex and dynamic" issue.[65] It was in that context that the Court stated that the harm sought to be addressed must be real, not imagined. This Court held that Congress cannot merely say broadcasting is jeopardized; the Court must be persuaded it is factually true, and that the "must carry" rules would alleviate those harms in the way Congress predicted. Moreover, this Court also stated in *Turner Broadcasting* that "courts must accord substantial deference to the predictive judgments of Congress. Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. . . . And Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.[66]

National Treasury Employees Union is similarly inapposite. In *United Public Workers v. Mitchell*[67] and *Civil Service Commission v. Letter Carriers*,[68] this Court expressed its approval of the Hatch Act, which prohibits partisan political activity by federal employees. However, in *National Treasury Employees Union*, the Court was reviewing Congress' attempt to greatly expand the Act to prohibit the receipt of honoraria by rank and file civil service workers, an issue never previously considered by the Court. The Court held that Congress could reasonably expand the holding in *Letter Carriers* to prohibit the acceptance of honoraria by high ranking officials, but could not assume the *Letter Carriers* rationale applied equally to "an immense class of workers with negligible

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[65] *Turner Broadcasting System, Inc.*, 512 U.S. at 665-666.

[66] *Id.* at 665.

[67] 330 U.S. 75 (1947).

[68] 413 U.S. 548 (1973).

power to confer favors on those who might pay to hear them speak or to read their articles."[69] The Court concluded that the lack of any evidence that the danger recognized in *Letter Carriers* was likely to result from rank and file employees receiving honoraria rendered the statute unconstitutional.[70]

In contrast, this Court has expressly recognized both the compelling interest the Kentucky statute is designed to serve and the narrowness of the remedy Kentucky has chosen. Accordingly, the Kentucky legislature was not obligated to make detailed legislative findings to enact the Aggregate PAC Limit.

C. The Sixth Circuit decision is not in conflict with *Carver v. Nixon*.

The Sixth Circuit decision is not in conflict with the Eighth Circuit's decision in *Carver v. Nixon*[71] because that court's opinion was limited to the narrow question whether a particular contribution limit adopted by referendum was too low. In that case, a Missouri referendum reduced candidate contribution limits to $300 in statewide races. The issue in *Carver* was whether this reduction constituted the difference in kind, not just degree, which *Buckley* requires to hold a contribution limit to be unconstitutionally low.[72] *Carver* addressed the absence of any findings supporting the Missouri electorate's decision that a limit so low was necessary. That issue is very different from the Sixth Circuit's application of this Court's precedent that aggregate limits on contributions

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[69] *National Treasury Employees Union*, 513 U.S. at 473.

[70] *Id.*

[71] *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995).

[72] *Id.* at 644.

to PACs validly deter evasion of constitutional contribution limits.

Moreover, *Carver* involved a referendum, not legislation enacted by a deliberative process. The Eighth Circuit therefore expressly declined to decide "[w]hether the deference *Turner Broadcasting System* requires for acts of Congress extends to the acts of the state legislative body" because, the court stated, that "is an issue not before us to decide."[73] Indeed, the Eighth Circuit's subsequent decision in *Rosenstiel v. Rodriguez*,[74] demonstrates that *Carver* was limited to its facts.

In *Rosenstiel*, the Eighth Circuit required no evidence of legislative findings that either the system of public financing at issue there was supported by Minnesota's compelling interests in preventing corruption or that the statutory scheme was narrowly tailored to that end. Rather, the *Rosenstiel* court, like the Sixth Circuit, relied upon Supreme Court precedent and the reasonable predictions of the state's legislative body to determine that the statutes were constitutional:

> In this case, the State seeks to promote a reduction in the possibility for corruption that may arise from large campaign contributions and a diminution in the time candidates spend raising campaign contributions thereby increasing the time available for discussion of the issues and campaigning. . . . Indeed, given the importance of these interests, the State has a compelling interest in stimulating candidate participation in its public financing scheme. . . . Thus, the constitutional validity of the State's scheme turns on whether the challenged provisions are narrowly tailored to serve these interests. We believe that

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[73] *Id.*

[74] 101 F.3d 1544 (8th Cir. 1996).

> each of the challenged provisions satisfies this test. Initially we observe that the State's basic public financing program of providing a public subsidy in exchange for the candidate's agreement to abide by expenditure limits is consistent with campaign financing plans which courts have long held satisfy strict scrutiny. . . . The expenditure limitation waiver also satisfies strict scrutiny. As we noted above, this provision removes the disincentive a candidate may have to participate in the public financing system because of the candidate's fear of being grossly outspent by a well-financed, privately funded opponent. Absent such a safeguard, the State could reasonably believe that far fewer candidates would enroll in its campaign financing program. . . . We likewise conclude that the contribution refund is narrowly tailored to serve the State's interests. . . . The State reasonably could conclude that this additional form of public subsidy will encourage candidate participation.[75]

Carver did not reach the issue that was before the Sixth Circuit in this case and, as *Rosenstiel* clearly demonstrates, the Eighth Circuit's standard of review of campaign finance regulations is simply not in conflict with the decision of the Sixth Circuit.

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[75] 101 F.3d at 1553-1554.

III. Kentucky's Aggregate PAC Limit does not deny KRL equal protection of the laws.

A. Because the Aggregate PAC Limit is designed to prevent evasion of the limit on the amount individuals may contribute to candidates, it is narrowly tailored to that end and is not discriminatory.

KRL contends that the Aggregate PAC Limit impermissibly discriminates against PACs because there is no similar limit on the amount that individuals may contribute to multiple candidates or to multiple political parties. That argument ignores the fact that the Aggregate PAC Limit is designed to deter circumvention of the $1,000 limit on contributions to a single candidate. An aggregate limit on contributions to several different candidates obviously would not serve that purpose. Similarly, Kentucky limits contributions to a political party to $1,000, but does not impose an aggregate limit on contributions to multiple political parties. However, Kentucky does not permit fusion tickets,[76] so contributions to several different political parties could not evade the $1,000 limit on a person's contribution to a single candidate. Accordingly, there clearly is a reasonable basis for treating PACs differently from parties and candidates in the context of aggregate annual contribution limits.

As the Sixth Circuit held, Kentucky's Aggregate PAC Limit regulates PACs differently because of their ability to serve as conduits for evading limits on contributions to candidates. In contrast, there is no correlative reason to limit the number of candidates or parties to whom an individual or organization can contribute, since those

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[76] *See Timmons v. Twin Cities Area New Party*, 117 S.Ct. 1364 (1997).

contributions do not risk evading the limit on contributions to individual candidates.

Moreover, Kentucky's Aggregate PAC Limit is less restrictive of expression and association than KRL's suggested aggregate contribution limit applicable to all PACs, candidates and political parties. Kentucky's Aggregate PAC Limit allows individuals to contribute to an unlimited number of candidates for political office and to an unlimited number of political parties, and to make unlimited independent expenditures. The statute is therefore not unconstitutionally discriminatory, but narrowly tailored to accomplish its purpose.

B. The Sixth Circuit followed this Court's precedent when it held that PACs could be treated differently because of their different structure.

The opinion for the Court in *CMA* held that different types of political entities can be regulated differently, recognizing the differing structures of those entities and the differing political purposes they serve:

> The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process.[77]

KRL concedes this holding was an opinion of the Court, not a plurality opinion.[78] The unanimous Court in *Federal Election Commission v. National Right to Work Committee* reaffirmed this holding:

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[77] *California Medical Association*, 453 U.S. at 201.

[78] Petition at 6.

> **As we said in California Medical Assn. v. Federal Election Commission, the "differing structures and purposes" of different entities "may require different forms of regulation in order to protect the integrity of the electoral process."** . . . The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, and there is no reason why it may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals.[79]

Despite KRL's attempt to convince this Court that the Sixth Circuit "implicitly" held PACs were inherently corrupt or "nefarious,"[80] the Sixth Circuit merely held that PACs may be treated differently from political parties and candidate campaign committees because PACs are different from parties and candidates in this context. The Sixth Circuit held:

> The disparate treatment under Kentucky's Campaign Finance Law reflects [a] . . . legislative determination that aggregate limitations are necessary to prevent manipulation of permanent committees in order to evade the Act's $1,000

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[79] *National Right to Work Committee*, 459 U.S. at 210-211, *quoting California Medical Association*, 453 U.S. at 201.

[80] KRL describes Kentucky's aggregate limit on contributions to PACs as part of what it describes as a universal trend to "get PACs." Petition at 7-9. Neither the legislature nor the Sixth Circuit relied upon the premises set forth in KRL's brief in determining that it was necessary to limit an individual's aggregate contributions to PACs in order to prevent circumvention of the limits on the amount of contributions from individuals to candidates and KRL's claims in this regard are wild suppositions.

> limitation on direct contributions to any one political candidate.[81]

Thus, the Sixth Circuit followed this Court's precedents in determining that KRL had not been denied equal protection of the law.

C. There is no conflict among the circuits on this issue.

KRL claims that the Sixth Circuit's opinion conflicts with the First Circuit's decision in *Vote Choice v. DiStefano*.[82] However, *Vote Choice* does not stand for the proposition that PACs can never be regulated differently than parties or candidates. Rather, *Vote Choice* merely stated that there must be a reason for treating PACs differently and found, that on the facts before it, there was no legitimate reason for treating them differently.[83]

In *Vote Choice*, the First Circuit considered a facial challenge to a statute that mandated "first dollar disclosure" for PACs, meaning that every amount contributed to a PAC had to be disclosed. The Court contrasted this with the $100 reporting threshold applicable to candidate campaign committees. The First Circuit held there was no basis for this disparate treatment of PACs.[84]

In contrast, it is entirely reasonable to conclude that individuals could circumvent Kentucky's $1,000 limit on contributions to candidates by contributing $1,000 to unlimited numbers of PACs with the intention that those contributions be passed on to their favored candidate. It is equally reasonable to conclude that contributions to

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[81] 108 F.3d at 649, App. 29.

[82] *Vote Choice v. DiStefano*, 4 F.3d 26 (1st Cir. 1993). *See* Petition at 26-28.

[83] *Vote Choice v. DiStefano*, 4 F.3d at 35.

[84] *Id.*

several different candidates or several different parties will not evade the limit on a contribution to a single candidate. It is therefore reasonable to limit aggregate contributions to PACs without limiting aggregate contributions to multiple parties or multiple candidates. Thus, *Vote Choice* is simply distinguishable. There is no split in circuits.

CONCLUSION

Because the Sixth Circuit followed this Court's precedents and because there is no conflict between the Sixth Circuit's decision and the decisions of other courts of appeals, Respondents respectfully request that this Court deny KRL's petition.

Respectfully submitted,

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Dated: August 7, 1997

SUPPLEMENTAL APPENDIX

Transcript of Preliminary Injunction Hearing

* * *

[p. 3] THE CLERK: Case number 3:95-CV-00582. Kentucky Right to Life, Incorporated, et al. versus Nicholas King, et al.

THE COURT: Good afternoon, everyone. All right. We are here on motions for preliminary injunction, which I understand there's – basically we are in a position to decide the case on summary judgment or permanent injunction, whichever the case may be.

MR. BOPP: I believe we are, Your Honor, with one request. We obtained their motion for summary judgment and motions to dismiss yesterday by fax, and they were kind enough to do that to accommodate us. We would like to have an opportunity to respond to their submissions, and in that event we would request the court to consider issuing a temporary restraining order or preliminary injunction allowing us time to respond.

THE COURT: Okay. Well, I think what we will do is we will have our discussion here today, see what the issues are, and to the extent there needs to be a response by anyone, it can be of a narrowly focused nature, as they say.

MR. BOPP: Appreciate that, Your Honor.

THE COURT: Okay. I think, first of all, perhaps it would be well to determine what the issues are that we are going to discuss, and I think perhaps it would be best for the plaintiffs to tell me, first of all, what you believe

the [p. 4] issues are, see if we can agree on that, and then I'll give each of you an opportunity to talk about what you think is most important and I'll probably have some questions, if you all think that's an appropriate way to go.

MR. SNYDER: I think that makes sense, Your Honor.

THE COURT: I gather there's no need for any testimony or anything in the record that either – it seems as though the facts, although they have not been stipulated, are agreed to by everyone.

MR. BOPP: That's our understanding, Your Honor.

MR. SNYDER: I think that's correct, Your Honor. The only factual issue – only thing that could be a factual issue that I am aware of is their pleading that Kentucky Right to Life, Inc. accepts only minimal contributions from for-profit corporations. We are willing to accept that at face value rather than probing it by discovery for purposes of what amounts to declaratory relief on the theory that if that becomes untrue in the future, there's always enforcement action related to that. For purposes of the relief they seek, we will stipulate that fact to be true as of this proceeding.

THE COURT: Okay. Maybe you could first then take a shot at what the issues are.

MR. BOPP: Thank you, Your Honor. Your Honor, my name is Jim Bopp. I'm attorney for the plaintiffs. Also

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[p. 83] enlightening and very clear. I appreciate that on both sides.

MR. BOPP: Thank you very much.

THE COURT: Thank you.

(End of proceedings.)

CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ Alan W. Wernecke — 1-11-96

ALAN W. WERNECKE, RMR — DATE

Official Court Reporter